NO. 47648-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MATTHEW OSTASZEWSKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00280-5

BRIEF OF RESPONDENT/ **CROSS APPELLANT**

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SERVICE	Suzanne Lee Elliott 705 2nd Avenue, Suite 1300 Seattle, Wa 98104-1797 Email: suzanne-elliott@msn.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 29, 2016, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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The trial court erred in instructing the jury on the law of self-defense where the defense burden of production failed because the defendant's belief in the necessity of self-defense was not reasonable.

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Robert Matthew Ostaszewski was charged by original information filed in Kitsap County Superior Court with Assault in the First Degree

(assault one) with a special allegation that the same was done while he was armed with a firearm. CP 1. On June 9, 2014, an Omnibus Order was entered wherein Ostaszewski gave notice of self- defense and the state gave notice of further arraignment in the case. CP 136. Another Omnibus Order was entered on November 18, 2014 again indicating self-defense and again giving notice to the defense of further arraignment. CP 137.

Further arraignment became necessary on February 2, 2015 with the filing of a first and then second amended informations. The second amended information differed from the first amended by omitting a special allegation that the shooting occurred from a motor vehicle. CP 40. The second amended information charged attempted Murder in the First Degree with a firearm special allegation, Assault in the First Degree with a firearm special allegation, and Drive-by Shooting. CP 40.

Trial on these charges commenced February 2, 2015. RP 2. The trial court heard arguments regarding Ostaszewski's claim of self-defense both in limine and at the close of the evidence. The trial court instructed the jury on self-defense for attempted murder (CP 71-76), self-defense on assault one (CP 77-79), and self-defense on drive-by shooting (CP 84-87). The trial court also gave a first aggressor instruction. CP 88.

The jury returned a verdict of not guilty on the attempted murder charge. CP 98. Ostaszewski was found guilty of assault one and drive by

shooting with a special verdict finding that Ostaszewski was armed with a firearm at the time he committed assault one. CP 98-99.

On April 29, 2015, Ostaszewski filed a motion for new trial. CP 101. At sentencing, that motion was denied. RP (5/4/15) 9. The trial court also denied defense motions for downward departure on sentencing. Ostaszewski received a standard range sentence. CP 111. Notice of Appeal was timely filed. CP 121.

B. FACTS

On November 12, 2013, Joshua Johannessen and his girlfriend, Laura Sprague, were living in their truck in the Fred Meyer parking lot. RP 496. Their truck had broken down and they had been there for three or four days. Id. The couple was struggling financially and had lost their house. RP 497. Ms. Sprague's twelve-year-old son had been sent to his grandfather's while they were homeless. Id.

That morning, the couple had walked to the son's school for show and tell. RP 498. They took their puppy to show the class. Id. As they walked back, they were in a good mood from having been able to see the boy. RP 499. As they returned to their truck, they noticed a man sitting in a van parked behind their truck. RP 500. They proceeded to go to get

something to eat in the store. RP 504.

After 15 or 20 minutes in the store, they returned to their truck. RP 505. While eating in their truck, they again noticed the man in the van behind them. RP 506. The man was holding up a phone. Id. He had been there for about 40 minutes. Id. The couple wondered what he was doing. Id. They went back to the store for ice cream, remaining inside for 30 or 40 minutes window shopping. Id.

Returning to their truck after the ice cream trip, they found that the van had moved and was parked in front of them. Id. Noticing the move, Mr. Johannessen wondered what was going on with the man. Id. They noticed that the man had his phone out his window, panning it toward them. RP 507-08. It looked like he was taking pictures or filming them. RP 508. They were concerned. Id.

Mr. Johannessen decided to find out if he was filming them. RP 508-09. The man had been engaged in the picture taking behavior for an hour and 45 minutes. RP 543. He opened his door and stood up and got no reaction so "I flipped him off to see if he would react." RP 509 (ln. 8). Johannessen took a picture of the man with his own phone. Id. Johannessen's picture showed the man in the van taking a picture of him. RP 510. At that point, Mr. Johannessen gave his phone to Ms. Sprague and went to see what was going on. RP 513. He was not angry, he just

wanted to know what the man was doing. RP 544.

Johannessen walked toward the van. RP 513. He was holding a cigarette and his truck keys. RP 516. The man in the van didn't react, continuing to look straight ahead. RP 514. As he approached the van, he noticed that the man looked nervous. RP 515. The man said nothing to Mr. Johannessen. Id. Mr. Johannessen arrived at the open widow and inquired "What the fuck are you doing? Are you videotaping me and my girlfriend?" RP 515 (ln. 24). Johannessen had his hands to his sides. RP 516.

Looking in the van window, Mr. Johannessen saw "two clips loaded on his passenger seat." RP 517 (ln. 21). The man in the van was shaking and sweating. RP 533. Being scared for his life and not knowing what to do, Johannessen said that if the man is going to shoot him, he better kill him or he was coming through the window. RP 533. The man moved a paper magazine in his lap, raised a gun, pointed it at Johannessen's face (RP 520) and shot Johannessen in the neck. Id. Johannessen had jumped when he saw the gun or he would have been shot in the face. RP 520. Upon being shot, Mr. Johannessen dropped the keys and cigarette and moved toward the back of the van to try to get away. RP 519.

As he ran away, the man in the van fired more shots. RP 520. One

hit Mr. Johannessen in the wrist. RP 521. This wound happened while Johanessen had his back to the assailant and was running away. RP 522. Responding emergency persons removed a pocket knife from inside Johannessen's pocket. RP 535. The shot to the wrist disabled Mr. Johannessesn's arm so that at the time of trial he was unable to buckle his infant daughter into her car seat. RP 539.

The man in the van doing the shooting was Robert Ostaszewski. He was not working on November 12, 2013 but his wife Michelle was working at the Fred Meyer. RP 622. Around noon, the wife called and related a story about a customer she had helped. RP 624. When Ms. Ostszewski asked the customer if he had a Fred Meyer rewards card, the customer said no but I have a 9 millimeter. Id. To Mr. Ostaszewski she sounded shaky and scared. RP 625. 15 or 20 minutes later, Mr. Ostaszewski went to the Fred Meyer. RP 628. He went to see if his wife was safe and alright. RP 628.

Ms. Ostaszewski gave Mr. Ostaszewski a description of the person who made the 9 millimeter comment and related that she had found out that they were camped in the parking lot. Id. She described his car as a black SUV. RP 628-29. She described the woman with the man as having blonde hair and short. RP 634. When Ostaszewski arrived, he was looking for the black SUV. RP 629. He found a black SUV and parked behind it

in order to gather information. RP 630. He was taking photographs and saw Mr. Johannessen get out and walk toward the store. RP 631. Ostaszewski moved his car in order to continue to surveil Mr. Johanessen. Id. Not seeing Mr. Johannessen, he parked and went to see his wife. RP 632.

Focused on Mr. Johannessen, Ostaszewski went out looking for him, saw him and his girlfriend walking a dog, and moved his car to the front of the black SUV. RP 634-35. As he did so he was taking pictures of the SUV. Id. He took as many as a dozen photos. RP 636. Soon, Ostaszewski saw Mr. Johannessen take a picture back at him while Johannessen was flipping him off. Id. After a few minutes, he saw Mr. Johannessen hand the phone to Laura and start to approach him. RP 637.

On approach, Ostaszewski heard the question from Mr. Johannessen asking what he was doing. RP 638. He claims that at that point he said "back away" three times. RP 639. Ostaszewski saw something in his hands but did not know what it was. Id. Mr. Johannessen walked right up to Ostaszewski's window. RP 640. Mr. Johannessen never raised his hands toward Ostaszewski keeping them down by his side. RP 683. Ostaszewski thought he looked angry Id. Mr. Johannessen made the "if you are going to shoot me" comment which scared Ostaszewski. RP 642. He did not know that Mr. Johannessen was

not the person who made the 9 millimeter comment to his wife and so believed he had a gun. Id. So he "leaned back and drew, and I fired." Id. He fired two more shots as Mr. Johannessen fled, claiming they were fired at the ground. RP 645

No witness in the case saw a 9 millimeter other than Ostaszewski's gun, including his wife. RP 655. Ostaszewski did not see a gun. RP 659, 669, 700. Ostaszewski saw that Mr. Johannessen had a knife clipped to his pocket. RP 692. He did not testify that that knife was ever pulled, brandished or otherwise used against him. After he shot Mr. Johannessen, Laura Sprague approached the van and picked something up and Ostaszewski imagined that she also might be armed. RP 648. Ostaszewski claimed that he could not call the police while surveilling from in front of the couple's truck because "he hasn't done anything to me." RP 666. When Mr. Johannessen was at the van window, he never raised his hands. RP 667.

IV. ARGUMENT

A. AN AGGESSOR INSTRUCTION WAS PROPERLY GIVEN WHERE THE DEFENDANT WAS THE ONLY AGGRESSIVE PARTY AND IN FACT ENGAGED IN CONDUCT LIKELY TO ILLICIT A BELIGERENT RESPONSE .

Ostaszewski argues that the trial court erred in instructing the jury with the aggressor instruction. This claim is without merit because

evidence supported the state's theory that Ostaszewski was the aggressor by engaging in behavior likely to elicit a belligerent response.

Whether there is sufficient evidence to justify an aggressor instruction is a question of law that is reviewed de novo. *State v. Anderson*, 144 Wn.App. 85, 89, 180 P.3d 885 (2008). The supporting evidence is viewed in the light most favorable to the proponent of the instruction (here, the state). *State v. Bea*, 162 Wn.app. 570, 577, 254 P.3d 948 (2011) *rev. denied*, 173 Wn.2d 1003 (2011). "The State need only produce some evidence that [the defendant] was the aggressor to meet its burden of production." Id. (emphasis added) (citation omitted).

> An aggressor instruction is used in an appropriate case because
>
> the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action.

State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Such instructions are to be used sparingly and carefully; only given "in cases where the theories of the case cannot be sufficiently argued and understood by the jury without such an instruction." *Bea*, 162 Wn.App. at 576, *citing, Riley, supra.* This because an aggressor instruction "potentially removes self-defense from the jury's consideration, relieving the state of its burden of proving that a defendant did not act in self-

defense." Id.

Thus,

> A court properly submits an aggressor instruction where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant's conduct provoked the fight; or (3) the evidence shows that the defendant made the first move by drawing a weapon. A court errs when it submits an aggressor instruction and the evidence shows that the defendant used words alone to provoke the fight.

State v. Anderson, 144 Wn.App. 85, 89, 180 P.3d 885 (2008) (internal citation omitted) *citing Riley*, *supra*. Moreover,

> The provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response by the victim. The unlawful act constituting the provocation need not be the actual striking of a first blow. It must be related to the eventual assault as to which self-defense is claimed. The provoking act cannot be the actual assault.

Bea, 162 Wn.App. at 577 (internal citation and quotation omitted).

In the present case, the trial court instructed the jury on the law of self-defense with regard to each count.[1] The trial court also instructed the jury that

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon attempt to kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts or conduct provoked or commenced the fight, then self-defense is not available as a defense.

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[1] The acquittal on the attempted murder charge negates argument as to the propriety of the self-defense instruction on that count. The others will be discussed below in the cross review section.

CP 88. The given instruction quotes Washington Pattern Jury Instruction—Criminal (WPIC) 16.04. Ostaszewski makes no claim that this instruction misstates the law. The question in this case is whether Ostaszewski's conduct provoked or commenced the fight with Mr. Johannessen and therefore potentially negated Ostaszewski's claim of self-defense. We know that as provocation words alone do not constitute the necessary intentional act. *Riley, supra.* Nor, at the other end of the spectrum, does there need to be an actual striking of the first blow (although certainly such would be sufficient). *Bea, supra.* At bottom, an aggressor does not get self-defense because "the victim of the aggressive act is entitled to respond with lawful force." *Riley*, 137 Wn.2d at 912.

These principals point out a difficulty of Ostaszewski's argument: here, Mr. Johannessen used no force, lawful or otherwise, toward Ostaszewski. Ostaszewski's mistaken belief that he was armed with a 9 millimeter does not include any evidence whatsoever that anyone ever saw a gun or that a gun was ever used in any manner to frighten, intimidate, or threaten anyone. Ostaszewski makes no argument that the mere possibility (or mistaken certitude) that someone may own or be carrying a gun is equivalent to that person using that gun in a manner that warrants concern enough to allow that person to be shot if he approaches another person. Since Mr. Johannessen in fact had no gun, it is in fact impossible for him

to have done any such provocative act with a gun.

Similarly, there was no threat, intimidation, or provocation by the fact that Mr. Johannessen had a pocket knife. Again, the mere fact of possessing a small knife by itself cannot provide an adequate reason for the possessor of the knife to be shot when he approaches another person. Moreover, the record is very clear that Mr. Johannessen never pulled out the knife or brandished it or in any other manner used it toward Ostaszewski as a weapon. Ostaszewski simply observed, during his harassing surveillance, that the knife was in his pocket. In attempting to justify himself, Ostaszewski said that Mr. Johannessen had something in his hands as he approached Ostaszewski's van. But Ostaszewski admits that he did not see what was in his hands. From this, then, we know that he did not see Mr. Johannessen display or wield the knife in any manner let alone a threatenting manner.

There was no gun. A pocket knife was in no way used as a weapon. There was in fact no immediate danger that allowed Ostaszewski to use deadly force. The incident occurs entirely because of Ostaszewski's unreasonable apprehension of danger when there was in fact none. But at trial and on appeal, Ostaszewski tries to make much of Mr. Johannessen's use of language when he approached the van. Having no evidence that Mr. Johannessen used any weapon at all in this incident, Ostaszewski

claims that his use of swear words as he approached gave Ostaszewski adequate reason to shoot.

Further, the timing of any threatening words spoken by Mr. Johannessen at the van window is in dispute. In the light most favorable to the state, Mr. Johannessen threatened Ostaszewski with fisticuffs once he, Mr. Johannessen, correctly noted that Ostaszewski had a gun. It makes little sense to suppose that Mr. Johannessen would use the words "if you are going to shot me" if he had not seen evidence that Ostaszewski had a gun. Moreover, timing aside, there is still no evidence whatsoever that Mr. Johannessen was using a weapon in any way. Thus, even if this dispute in timing of Mr. Johannessen's statement could be cast in a light most favorable to Ostaszewski, it still provides inadequate justification for his actions. In the end, the rule is dispositive: words alone are insufficient provocation.

The record, then, is empty of any evidence of behavior by Mr. Johannessen that justifies his being shot. So the jury found in light of both self-defense instructions and an aggressor instruction. Of course the record is silent as to whether the jury's findings were based on the aggressor instruction or whether the jury simply did not believe in the reasonableness of the self-defense claim. The evidence supports either conclusion. One thing is clear, the incident does not occur at all save for

the aggressive and grossly reckless behavior of Ostaszewski. Since Mr. Johannessen did nothing wrong, there can be but one actor here that did an intentional act reasonably likely to provoke a belligerent response—Ostaszewski. As between these two men, nothing but Ostaszewski's nearly two hours of harassing surveillance led to the incident.

The circumstances that allow the giving of an aggressor instruction are present. First, the jury could reasonably conclude that Ostaszewski provoked Mr. Johannessen's approach to his vehicle. Certainly it was reasonable for Mr. Johannessen to want to enquire as to the reason that this unknown person is harassing he and his girlfriend. Second, although mere words spoken by Mr. Johannessen are insufficient provocation, the parties disagree whether or not Johannessen's threat to come through Ostaszewski's van window was said before or after Johannessen perceived a gun. Thus this dispute over the fomenting circumstances also warrants the giving of the instruction. And, finally, although the concept is stretched a bit, it is the fact that Ostaszewski is the first and only participant to pull a gun. Thus each of the three circumstances warranting the giving of the aggressor instruction is found in this case. See *State v. Anderson, supra.*

The giving of the aggressor instruction allowed the state to argue its case to the jury. The state's burden of production was easily satisfied

as there was more than just "some evidence" that Ostaszewski's harassing behavior caused any sort of reaction from Mr. Johannessen. The instruction was properly given.

B. THE DRIVE-BY SHOOTING STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED WHERE THE DEFENDANT'S CONDUCT FELL WITHIN THE PLAIN PROHIBITION OF THE LAW.

Ostaszewski next claims that the drive-by shooting statute under which he was convicted is unconstitutionally vague. He claims that because he is not a drug trafficker, because he got out of the car at some point, and because the statute's title can be defined as action taken from a moving vehicle, he could not understand that the statute prohibits the reckless discharge of a firearm from his car. This claim is without merit because Oistaszewski's behavior fell squarely within the statute's prohibition where he repeatedly and recklessly fired a firearm from inside his car and created a substantial risk of death or serious physical injury to another person.

First, 9A.36.045 provides

> (1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

> (2) A person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness.

In this case, the jury was instructed on subsection (1) only with minor modification. CP 80; instruction #24. Subsection (2) was not used. Thus it is irrelevant that subsection (2) allows an inference of recklessness by firing from a moving car. Appellant's Brief at 10. Further, the record is clear that the second clause in subsection (1) referring to firing from the immediate area of a motor vehicle has dubious application to the case because the evidence showed that all the shots fired came from inside Ostaszewski's car. Thus, Ostaszewski must prove some vagueness in "recklessly discharges a firearm. . .from a motor vehicle."

In doing so, he must do more than provide a dictionary definition of the statute's title. Appellant's Brief at 12. "The title of a statute…cannot limit the plain meaning of the text…it is of use only when [it] shed[s] light on some ambiguous word or phrase." *Pennsylvania Dept. of Corrections v. Yeskey,* 524 U.S. 206, 212, 118 S.Ct. 1952, ___ L.Ed.2d___(1998) (parenthesis in original). Moreover, the text refers to both the act of firing from within the car and from just outside and also separately refers to the inference of recklessness if the shooting is from a moving car. The legislature included all these permutations in the text. Ostaszweski cannot limit the statutory text by separately defining the title.

No ambiguous word or phrase needs to have light shed upon it by reference to the title. No authority is cited to support this novel approach to vagueness.

In *State v. Locklear,* 105 Wn.App. 555, 20 P.3d 993 (2001) *aff'd on other grounds State v. Rogers,* 146 Wn.2d 55 (2002), the Court of Appeals found the drive-by statute vague as applied to that case. Id. at 562. One fact controlled the holding in *Locklear:* the shooter had walked two blocks from the car before he recklessly discharged the firearm. Id. at 559. The issue there was whether that fact met the statute's requirement that the discharge be from the immediate area of the transporting vehicle. Id. There must be a nexus between the use of a car and the use of a gun. Id at 560. The Court of Appeals applied vagueness principles to the issue

> A statute is unconstitutionally vague "if it does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited, or if it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement." In alternative terms, a statute is unconstitutionally vague if it "forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application." A statute is presumed constitutional, and the party asserting unconstitutionality must show unconstitutionality beyond a reasonable doubt.

Id. at 559 (footnotes omitted). Further, "[t]he statute is not unconstitutionally vague if the defendant's conduct falls squarely within its prohibition." Id.

In discussing these principles, the court found that "[u]ndoubtedly,

a person of ordinary intelligence would know without guessing that this nexus exists when a car transports the shooter or the gun to the scene, and the shooter fires from inside the car." Id. This finding applies to Ostaszewski, who drove his gun to the scene and recklessly discharged his gun from inside the car. Thus *Locklear* is clearly factually distinct from the present case. Moreover, the vagueness analysis therein cuts against Ostaszewski's position. There is no "immediate area" issue in the present case. His act of shooting from inside his car falls squarely within the drive-by statute's prohibition.

Thus, under the reasoning of *Locklear*, Ostaszewski's vagueness argument fails. It should also be noted that the *Locklear* Court's vagueness approach is of dubious precedential value. The vagueness approach was criticized by the Supreme Court on review in light of the rule of judicial restraint that "the issue of the constitutionality of a statute will not be passed upon if the case can be decided without reaching that issue." *State v. Rogers,* 146 Wn.2d 55, 60, 43 P.3d 1 (2002). So stating, the Supreme Court proceeded to affirm the reversal of Locklear's conviction on the ground of insufficient evidence, not vagueness. Id. at 62. The Supreme Court found it obvious that discharging a firearm two blocks away from the parked car is not discharge in the "immediate area" of the car. Id.

Ostaszewski's case is factually distinct from *Locklear*. The vagueness analysis has little if any precedential value. And, there is no dispute that Ostaszewski fired from inside the car that brought he and his gun to the scene. His behavior falls squarely within the statute's prohibition. His vagueness challenge fails.

C. DRIVE-BY SHOOTING AND FIRST DEGREE ASSAULT ARE NOT SAME CRIMINAL CONDUCT UNDER 9.94A.589(1)(A) AND COUNSEL WAS THEREFORE NOT INEFFECTIVE FOR NOT ARGUING THAT THEY ARE THE SAME.

Ostaszewski next claims that first degree assault and drive-by shooting constitute the same criminal conduct for sentencing purposes. He claims that his counsel was ineffective for not preserving the issue below. This claim is without merit because the two crimes are not the same as they require different intent and have different victims. Thus there was neither deficient performance nor prejudice to Ostaszewski.

A finding of same criminal conduct requires the same criminal intent, at the same time and place, and the same victim. RCW 9.94A.589(1)(a). All these requirements must attend in order for this narrowly construed provision to apply. The defense has the burden of establishing same criminal conduct. *State v. Wright,* 183 Wn.App. 719, 732, 334 P.3d 22 (2014). Herein, such a finding would remove points from Ostazewski's offender score thus lowering his sentencing range. A

determination of what constitutes same criminal conduct, had the trial court made such a determination, is reviewed for abuse of discretion. Id. at 733.

In the present case, same time and place are established. A question remains, however, as to same intent and same victim. As to intent, Ostaszewski is correct as to the test that "the relevant inquiry is to what extent the criminal intent, when viewed objectively, changed from one crime to another," measured sometimes by considering whether one crime furthered the other. *Wright,* 183 Wn.App. at 734. However, this standard is secondary. The analysis begins with the statutes in question.

> We first look to the underlying statutes to determine whether the intents of each statute, if any, are the same or different for each count. If the intents are different, then the offenses are counted as separate crimes. If the intents are the same, then we look objectively to the sentencing facts and determine whether a particular defendant's intent was the same or different with respect to each count. If the intents are the same, then the counts constitute the same criminal conduct.

State v. Polk, 187 Wn.App. 380, 396, 348 P.3d 1255 (2015). Thus the first step is to consider the statutory intent elements for the various crimes being considered.

Under the first degree assault charge, Ostaszewski was alleged to have acted "with intent to inflict great bodily harm" on Mr. Johannessen. CP 42. Under the drive-by charge, Ostaszewski was alleged to have "recklessly discharged a firearm. . .in a manner which creates a substantial

risk of death or serious physical injury to another person." CP 43. The former clearly requires intentional behavior; the latter just as clearly requires reckless behavior. Thus the statutory intent elements are different. Following *Polk*, then, the two offenses are not the same and the inquiry should be at an end. Moreover, first degree assault requires neither a vehicle nor the discharge of a firearm as does the drive-by charge. Facts establishing drive-by shooting would not establish first degree assault.

The difference in the intent elements is dispositive as all the pieces of same criminal conduct must at once obtain. But it is unlikely that they include the same victim as well. As noted, the assault charge, as it must, identifies Mr. Johannessen as the object of Ostaszewski's criminal intent. The drive-by charge applies to any other person. This difference was considered by the Supreme Court in *Bowman v. State,* 162 Wn.2d 325, 172 P.3d 681 (2007). The issue there was the use of drive-by as a predicate for felony-murder. The appellant contended, much as Ostaszewski does here, that drive-by is like assault and thus cannot be a predicate for felony-murder under *In re the Personal Restraint of Andress,* 147 Wn.2d 602, 56 P.3d 981 (2002).

The *Bowman* Court rejected this argument, finding that drive-by shooting and homicide are "two separate and distinct crimes." Id. at 332.

The court said

> It is plain to see that the drive-by shooting statute does not criminalize conduct that causes bodily injury or fear of such injury. Rather, the statute criminalizes specific reckless conduct that is inherently dangerous and creates the risk of causing injury or death. Although a drive-by shooting may cause fear of bodily injury, bodily injury, or even death, such a result is not required for conviction. Drive-by shooting does not require a victim; it only requires that reckless conduct creates a risk that a person might be injured. Further, unlike in the case of assault, homicide can be committed without reckless discharge of a firearm.

Id. at 332. Thus, not only is there no concurrence of intent elements, the two crimes herein have different victims. Assault one had as its victim Joshua Johannessen; the drive-by shooting embraced anyone who might be injured by Ostaszewski's reckless behavior. Thus, neither criminal intent nor victim are the same for the purposes of RCW 9.94A.589(1)(a).

Finally, since these two offenses do not encompass the same criminal conduct, there is no ineffective assistance in failing to argue that it does. To show ineffective assistance, Ostaszewski must establish both deficient performance and resulting prejudice. Given the above, there was no deficiency and Ostaszewski's claim fails.

V. ARGUMENT ON CROSS REVIEW

A. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON SELF-DEFENSE.

The state timely filed a Notice of Cross Appeal. The state seeks review of

the trial court's order granting the defense request to instruct the jury on lawful use of force. Since under the facts Ostaszewski's claim of self-defense is objectively unreasonable, he fails to establish his burden of production.

Review of this issue combines abuse of discretion and de novo review

> Generally, we review a trial court's choice of jury instructions for abuse of discretion. A trial court may give jury instructions only when there is substantial evidence to support them. In evaluating whether the evidence is substantial enough to support a defendant's proposed instruction, the trial court must interpret it most strongly in his favor and must not weigh the proof, which is an exclusive jury function.
>
> Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.

State v. Douglas, 128 Wn.App. 555, 560-61, 116 P.3d 1012 (2005) (internal citation omitted). But in *State v. McCreven*, 170 Wn.App. 444, 461-62, 284 P.3d 793 (2012), this Court said "[w]e review de novo a jury instruction challenge and evaluate the jury instruction in the context of the instructions as a whole." In *State v. Walker*, 136 Wn.2d 767, 771-72, 966 p.2D 883 (1998), the Supreme Court held that a refusal to instruct based on a matter of fact is addressed to trial court discretion whereas a refusal based on a ruling of law is reviewed de novo. In any event, de novo review of the substance of the facts supporting the giving of the self-

defense instruction herein leads to the conclusion that the trial court abused its discretion in issuing those instructions.

A defendant seeking self-defense instructions has the initial burden

> The defendant bears the initial burden of producing some evidence that his actions occurred in circumstances amounting to self-defense, such as a reasonable apprehension of great bodily harm and imminent danger to himself or to another. The defendant need not, however, show actual danger. Rather, it is sufficient that the defendant reasonably believed that he, or another, was in danger of imminent harm. In making this determination, the jury must assess the self-defense evidence from the perspective of a reasonably prudent person standing in the defendant's shoes, knowing all the defendant knows and seeing all the defendant sees.

State v. Douglas, 128 Wn.App. 555, 562, 116 P.3d 1012 (2005) (internal footnotes omitted). In this case, the trial court ruled that Ostaszewski met his initial burden on all three counts. RP 754. Since he was acquitted of count I, attempted murder, the question here is the propriety of that ruling with regard to count II, assault one, and count III, drive-by shooting. The trial court asked the correct question: " whether there are sufficient facts such that a jury should be instructed on this defense." RP 745. Regarding the question of reasonableness, the trial court took it as a given that the defendant had a subject belief in danger. RP 748-49. Then, the court indicated that it was "not assessing whether it's reasonable or not in terms of subjective belief." Id. This is the trial court's analytical error. Since Ostaszewski's behavior was in fact not objectively reasonable, the

court should have applied the various aspects of objective reasonableness found in the law of self-defense when considering the legal sufficiency of his subjective belief. *See State v. Walden,* 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

With regard to assault one and drive -by, the jury was instructed as to lawful force. CP 77; #21 and #28. The two instructions are the same except for the phrases referring to the particular crimes. The assault one instruction provides that

> It is a defense to a charge of assault in the first degree that the force used was lawful as defined in this instruction.
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force used is not more than is necessary.
> The person using force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant is not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to the charge of Assault in the First Degree as charged in count I.

CP 77;#21.

The instruction contains the clause "when the force used is not more than is necessary." Hence the jury was instructed that

> Necessary means that, under circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount

of force used was reasonable to effect the lawful purpose intended. CP 78; #22. The general use of force instruction also refers to "conditions as they appeared to the person." Hence the jury was instructed that

> A person is entitled to act upon appearances in defending himself, in Counts II and III, if that person believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 79; #23. Finally, in an instruction of dubious application to the facts or the theory of either party, the jury was instructed that there is no duty to retreat. CP 87; #31. All these instructions are correct statements of the law of self-defense. *See* RCW 9A.16.020.

The instructions contain both subjective and objective elements. *See State v. Callahan*, 87 Wn.App. 925, 929, 943 P.2d 676 (1997). Subjectively, the jury is told to view the circumstances as they appeared to the person with consideration to all the facts and circumstances known to him. But at each turn, this subjective element is conditioned with an objective requirement that his actions and beliefs about the necessity of use of force be reasonable. *State v. Graves*, 97 Wn.App. 55, 62, 982 P.2d 627 (1999). Thus the jury is to view the defendant's actions from the point of view of a "reasonably prudent person." Thus the necessity of his action must be based on "circumstances as they reasonably appeared." Thus he may be mistaken as to actual danger but only if his perception of

danger is based on "good faith and reasonable grounds." The state's position is despite Ostaszewski's possible subjective belief in the danger he faced, those beliefs, and the level of violence with which he responded to those beliefs, were clearly not reasonable.

Ostaszewski used deadly force, firing a gun essentially at the face of Mr. Johannessen. See *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) ("the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant."). Here much of what we said above about the aggressor instruction is relevant. As Ostaszewski so aptly stated "I couldn't call 911 because he hasn't done anything to me." (emphasis added) Mr. Johannessen never did anything to him that entire day. Ostasewski never saw a gun. The pocket knife that was seen was never drawn, brandished, or used in any manner. At the window of the van, Mr. Johannessen's hands remained at his sides. RP 691. When he saw the gun, Mr. Johannessen offered to assault him. But simple assault or an ordinary battery do not justify deadly force. *State v. Ferguson*, 131 Wn.App. 855, 860-61, 129 P.3d 856 (2006); *see also State v. Brooks*, 172 Wash. 221, 222, 19 P.2d 924 (1933) ("The doctrine of self-defense cannot ordinarily be successfully invoked when a deadly weapon is used to repel simple assault.")

Failing to establish that Mr. Johannessen did anything at all

physically toward Ostaszewski, he attempts justification by highlighting the use of foul language. Defense counsel argued that Mr. Johannessen should have approached Ostaszewski with "pardon me sir" (RP 839-40) or "hey what are you doing." RP 852. But words alone never provide adequate provocation. See *State v. Anderson, supra,* 144 Wn.App. at 89.

But having failed to kill Mr. Johannessen with the first shot, Ostaszewski continued to fire. In closing argument, the state told the jury that this continued firing is the act constituting the assault count. RP 826-27. At that point Mr. Johannessen was running away. Ostaszewski was fearing retaliation for his act of pointing and firing a gun point-blank at Mr. Johannessen. RP 644, 696. So he fired two more shots, hitting Mr. Johannessen in the arm with one. Ostaszewski indicated that when he fired the first shot it was his intention to get Mr. Johannessen away from him because "he was right up on me." RP 695. No piece of law can be found that finds justification for using deadly force in order to get a person away from you. But in this he succeeded. Notably, Ostaszewski did not say that he fired because Mr. Johannessen was assaulting him or threatening him with a weapon. The obvious difficulty for Ostaszewski at this point is to establish that he had a reasonable belief the he, Ostaszewski, was about to be injured after he had shot Mr. Johannessen and Johannessen was running for his life.

How does one believe in "good faith and on reasonable grounds"

that he is about to be injured when the potential assailant is running away from the person? The answer as a matter of law, at least on these facts, should be that one cannot. Moreover, the entire incident is amenable to the same argument. The issue is the appearance of danger. Here the word 'appearance' should be given a narrow definition. The Merriam-Webster online dictionary defines "appearance" as "the way that someone or something looks." The implication of that definition in this case is that Ostaszewski must have actually seen something dangerous. Mr. Johannessen never appeared to be dangerous. Any danger that he presented was purely in the mind of Ostaszewski, who saw no appearance of danger. Ostazewski's entire mind set was the result of his reliance on hearsay and totem-pole hearsay. He did not see the demeanor of the person who really made the initial 9 millimeter remark. Again, he never saw a gun. He never saw Mr. Johannessen engage in any unlawful or assaultive behavior. There simply is nothing at all that appears as though there was actual danger, mistaken or not.

In *State v. Bell*, 60 Wn.App. 561, 805 P.2d 815 (1991), *rev denied*, 116 Wn.2d 1030 (1991), the trial court's refusal to give lawful force instructions was affirmed. There, defendant sought the instructions after having bludgeoned a man to death. He alleged that he had acted because of homosexual advances by the victim. On appeal, the defense argued that the question of whether or not sufficient evidence was asserted for the

giving of the instructions should be viewed through the lens of the defendant's subjective beliefs to the exclusion of the reasonableness enquiry. Id. at 566-67. The Court of Appeals disagreed. The Court held that "where a defendant claims that he acted in self-defense, he must produce evidence to show that he had a good faith belief that deadly force was necessary, and that this belief, from an objective standpoint, was reasonable." Id. at 567 (emphasis added), *citing, State v. Hughes*, 106 Wn.2d 176, 201, 721 P.2d 902 (1986). Just as in *Bell*, Ostaszewski argued and the trial court ruled that his subjective state was the paramount consideration. This was error in light of Ostaszewki's rather complete lack of reasonable behavior.

In contrast to the self-defense instruction ruling, at sentencing the trial court recognized the lack of reasonableness. Ostaszewski asked for a downward departure. In denying that request the trial court said "to suggest that he [Johannessen] initiated this and brought it on himself is absurd." RP 44. The trial court said of Ostaszewski's behavior "His conduct in this case was grossly reckless and clearly not reasonable." RP 45 (emphasis added). These findings cut directly against the trial court's jury instruction ruling. These findings are supported by the evidence. The trial court erred in not applying these findings to analysis of the jury instruction issue and that ruling should be reversed.

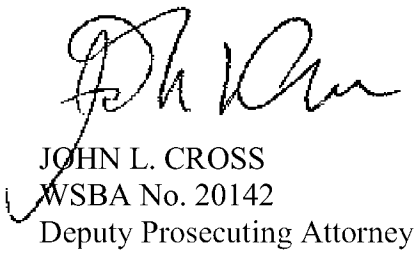
VI. CONCLUSION

For the foregoing reasons, Ostaszewski's conviction and sentence should be affirmed.

DATED February 29, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



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